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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-195646 *Claim for* **DATE:** December 27, 1979

MATTER OF: Samuel Freiberg - Retroactive Temporary Promotion and Backpay

- DIGEST:**
1. Employee's reassignment and reduction in rank from GS-12 supervisory position to GS-12 non-supervisory position was determined to be erroneous personnel action. However, such erroneous personnel action creates no entitlement to retroactive temporary promotion and backpay because it did not affect his pay and allowances as to constitute "an unjustified or unwarranted personnel action" remediable pursuant to the Back Pay Act. (5 U. S. C. § 5596 (1976)).
 2. Although action on March 6, 1977, reducing employee in rank from a supervisory GS-12 to a nonsupervisroy GS-12 position was erroneous, correction of that action does not entitle employee to retroactive temporary promotion with backpay based on earlier action on October 30, 1976, terminating his detail to a GS-13 supervisory position and returning him to his GS-12 supervisory position. Termination of detail was within agency discretion, and after October 30, 1976, employee no longer performed higher grade duties, which were assigned to another individual.

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Mr. Samuel Freiberg requests reconsideration of his claim for retroactive temporary promotion and backpay which was denied by our Claims Division's settlement dated June 12, 1979. Consistent with the following analysis we are sustaining our Claims Division's adjudication.

The record shows that Mr. Freiberg served in a GS-13, Supervisory General Supply Specialist position under temporary promotion and informal details during the period March 1 to October 30, 1976. He was then returned to his official position as a GS-12, Supervisory General Supply Specialist. Subsequently, Mr. Freiberg was advised by letters dated January 7 and February 18, 1977, that he would be reassigned to a non-supervisory GS-12, General Supply Specialist position. That

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reassignment and reduction in rank took place effective March 6, 1977.

When Mr. Freiberg successfully appealed his reduction in rank, the Civil Service Commission (now Office of Personnel Management) directed his employing agency to cancel the action, retroactively restoring him to his GS-12, Supervisory General Supply Specialist position effective March 6, 1977, and continuing until his retirement on April 15, 1977.

In a separate action based on these facts, Mr. Freiberg filed a claim with his agency for a retroactive temporary promotion and backpay in connection with his service in the GS-13, Supervisory General Supply Specialist position. The claim was allowed by the agency and Mr. Freiberg received a retroactive temporary promotion and backpay for the period from August 28, 1976 (the 121st day of the improper detail), through October 30, 1976, the last day of his detail based on the Turner-Caldwell decisions, 55 Comp. Gen. 539 (1975) and 56 id. 427 (1977).

Mr. Freiberg subsequently filed a claim for retroactive temporary promotion and backpay for the period October 31, 1976, to his retirement on April 15, 1977, on the basis of his erroneous reassignment and reduction in rank.

Entitlement to backpay is governed by 5 U.S.C. § 5596(b) (1976) which provides in pertinent part as follows:

"(b)(1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective-bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee--

"(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect--

"(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period * * *."

The Back Pay Act was intended to provide a monetary remedy for wrongful reductions in grade, removals, suspensions, and other unjustified or unwarranted actions affecting pay and allowances that could occur in the course of reassignments and change from full-time to part-time work. United States v. Testan, 424 U.S. 392, 405 (1976). Although Mr. Freiberg's reassignment and reduction in rank from a GS-12 supervisory position, to a GS-12 non-supervisory position was later determined to be an erroneous personnel action, it is clear that the erroneous personnel action did not result in the reduction or withdrawal of all or a part of his pay, allowances, or differentials, and is therefore not an "unjustified or unwarranted personnel action" remediable pursuant to the Back Pay Act.

Mr. Freiberg further contends that although his erroneous reduction in rank was effective on March 6, 1977, the erroneous personnel action was actually commenced in September 1976 when agency officials asked him to accept a reduction in rank. He claims that he was adversely affected as early as October 30, 1976, when his detail to the GS-13, Supervisory General Supply Specialist position was terminated and a new employee assumed the GS-13, supervisory position. Mr. Freiberg asks that the effective date of his erroneous reduction in rank be established as October 31, 1976, and contends that but for the alleged adverse personnel action on October 31, 1976, he would have continued to fill the GS-13, supervisory position--either by permanent promotion or through a continued detail--from October 31, 1976, through April 15, 1977. On this basis Mr. Freiberg contends that he is entitled to a retroactive temporary promotion with backpay for this additional period.

Since, the Civil Service Commission corrected Mr. Freiberg's improper reassignment and reduction in rank by directing that he be restored to his GS-12 Supervisory General Supply Specialist

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and since he in fact held that position prior to March 6, 1977, there is no personnel action subject to correction on the basis of the Civil Service Commission's findings for the period from October 31 to March 5, 1976.

In the Turner-Caldwell decisions, supra, we held that employees officially detailed to established higher level positions for more than 120 days are entitled to retroactive temporary promotions with backpay beginning with the 121st day of the detail until the detail is terminated. Since the record clearly indicates that Mr. Freiberg no longer performed the duties of the GS-13 position after October 30, 1976, the Turner-Caldwell line of decisions provides no basis to retroactively promote him to the GS-13 position and award him backpay for the period after October 30th.

The personnel action which returned Mr. Freiberg to his appointed position as a GS-12 Supervisory General Supply Specialist at the end of his detail to the GS-13 Supervisory General Supply Specialist position, cannot be considered an adverse action under 5 C.F.R. Part 752 and creates no entitlement to continued receipt of the higher rate of pay. In the circumstances presented, the detail action was properly subject to the agency's discretion and Mr. Freiberg obtained no vested right under law or regulation to have the detail continued or to be permanently promoted to the higher graded position.

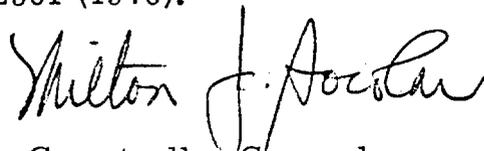
Mr. Freiburg received a retroactive temporary promotion and backpay in connection with his extended detail for the period from August 28 through October 30, 1976, when the detail was terminated and Mr. Freiburg returned to his regular duties. As indicated by our Claims Division's determination, from October 31, 1976, until he retired effective, April 15, 1977, Mr. Freiburg was entitled to and properly received the salary of the GS-12 Supervisory General Supply Specialist position in which he was employed.

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In regard to Mr. Freiberg's inquiry as to his right of appeal, decisions of the Comptroller General are binding on executive agencies of the United States. 54 Comp. Gen. 921, 926 (1975). However, independent of the jurisdiction of this Office, the United States Court of Claims and District Courts have jurisdiction to consider certain claims against the Government if suit is filed

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within 6 years after the claim first accrued. See 28 U.S.C.
§§ 1346(a)(2), 1491, 2401, and 2501 (1976).

A handwritten signature in cursive script, appearing to read "Milton J. Aocular".

For the Comptroller General
of the United States